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No. 07-1015

IN THE
Supreme Court of the United States

JOHN D. ASHCROFT, former Attorney General of the United States, and ROBERT MUELLER, Director of the Federal Bureau of Investigation,

Petitioners,

v.

JAVAID IQBAL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE AMERICAN ASSOCIATION FOR JUSTICE AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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INTEREST OF AMICUS CURIAE

The American Association for Justice ("AAJ") formerly the Association of Trial Lawyers of America, respectfully submits this brief as *amicus curiae* in support of Respondent. This brief is filed with the consent of all parties.[1]

AAJ is a voluntary national bar association whose approximately 50,000 trial lawyer members primarily represent plaintiffs in personal injury cases and other civil actions, including civil rights actions. AAJ has participated as *amicus* before this Court in dozens of cases of importance to its members and to the public interest. The Association also participates regularly in the advisory committee deliberations and legislative processes by which amendments are made to the Federal Rules of Civil Procedure. Throughout its 62-year history, AAJ has advocated for rules of civil pleading and practice in the United States that accord victims of civil wrongs a full and fair opportunity for legal redress.

SUMMARY OF ARGUMENT

Amicus addresses the first of two questions presented in the petition: whether the qualified immunity of high government officials under *Bivens* must be negated by heightened pleading of specific

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[1] Pursuant to Rule 37.6, *Amicus Curiae* states that no counsel for a party authored any part of this brief, and no person or entity, other than the *Amicus Curiae*, its members, and its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for both parties have consented to the filing of this brief.

facts in a plaintiff's complaint, regardless of whether those facts are available without discovery, in order to satisfy Rule 8(a)(2)..

This Court recognized in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), as it has many times before, that the Rules Enabling Act allows changes to the Federal Rules of Civil Procedure only by the deliberative process set out in that statute and not by judicial decision. *Twombly* respected this principle by affirming repeatedly that its holding should not be read to alter the liberal civil pleading requirements of Fed. R. Civ. P. 8(a)(2), or to heighten those requirements in any sense. *Id.* at 168. *Twombly* emphasized, in an antitrust law context in which circumstantial allegations can suggest lawful and unlawful conduct with equal force, that a Rule 8(a)(2) "showing that the pleader is entitled to relief" is not made out solely on allegations that are consistent with both actionable and non-actionable conduct. Nor may the pleader rely on such equivocal allegations as the sole basis for an empty label or conclusion such as, "These facts constituted negligence." *Twombly* requires further allegations under Rule 8(a)(2) only where the allegations presented suffer from either or both of these deficiencies.

Respondent Iqbal's complaint more than meets Rule 8(a)(2) pleading requirements as its allegations go well beyond the equivocal or conclusory. The complaint directly alleges and specifies the personal involvement of petitioners Ashcroft and Mueller in violations of Iqbal's constitutional rights. It gives these officials fair notice of Iqbal's claims against them, and sets forth in more than sufficient detail

the grounds on which those claims rest. The lower courts were correct to read Iqbal's allegations against General Ashcroft and Director Mueller as plausible under *Twombly*.

The presence of allegations that anticipate or negate a defense, such as qualified immunity, is not a proper test of the sufficiency of the complaint as a pleading. Where the complaint's allegations are so vague or ambiguous that they fail to place a defendant on notice that a defense of qualified immunity may be raised, a court may entertain or invite a motion for more definite statement under Rule 12(e), an option suggested by the Second Circuit in the decision here under review, or it may order a reply to an answer under Rule 7(a)(7), where the answer validly states an inability to discern whether a qualified immunity defense may be available. To hold otherwise, for qualified immunity defenses or any other defenses, would contravene the general rule against requiring complaints to anticipate or negate defenses, and would threaten the entire federal system of notice pleading.

Finally, to hold that a complaint otherwise satisfactory under Rule 8(a)(2) is defective if it fails to plead specific "hidden facts," *i.e.,* facts within a defendant's sole knowledge that will not become available without discovery, traps the plaintiff in a "Catch-22" that is inconsistent with venerated norms of access to courts and fundamental fairness. The same is true for requiring specific allegations of a defendant's intent to discriminate unlawfully, or his or her knowledge of such discrimination by others: to make such a requirement part of the Rule 8(a)(2) sufficiency standard would amount to judicial

alteration of Rule 9(b), which provides that "malice, intent, knowledge, and other condition of mind of a person may be averred generally" to suffice to place the matter in issue. Iqbal's complaint pleads facts sufficient to place these petitioners on notice of his constitutional claims, and to frame whatever qualified immunity defense they wish. The complaint may not be found wanting under Rule 8(a)(2) for lack of specific factual allegations of the time, place, or content of these petitioners' secret deliberations or states of mind concerning the policy that Iqbal validly alleges these petitioners designed, promulgated, and implemented, a policy which subjected him to brutal mistreatment and degradation on account of his race, national origin, and religion in violation of the Constitution.

ARGUMENT

I. THIS COURT HAS SHOWN ITS CONTINUING COMMITMENT TO NOTICE PLEADING UNDER THE FEDERAL RULES.

A. *Twombly* Did Not Change The Pleading Requirements of Rule 8(A)(2), and Could Not Have Done So Under the Rules Enabling Act.

The Rules Enabling Act of 1934, *as amended,* 28 U.S.C. §§ 2071 through 2077, creates an elaborate deliberative process for the adoption and amendment of "general rules of practice and procedure" for the federal courts. 28 U.S.C. § 2073(a). That power is exercised only through procedures for deliberation "prescribe[d]" by the Judicial Conference of the United States. 28 U.S.C. § 2073(a)(1). As the court

held in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997):

> Federal Rules take effect after an extensive deliberative process involving many reviewers: a Rules Advisory Committee, public commenters, the Judicial Conference, this Court, the Congress. The text of a rule thus proposed and reviewed limits judicial inventiveness. Courts are not free to amend a rule outside the process Congress ordered[.]

Id. at 620 (citing 28 U.S.C. §§ 2073, 2074). Just as the Rules themselves may not "abridge, enlarge or modify any substantive right," 28 U.S.C. § 2072(b), the courts may not short-circuit the Rules process by judicial decision.

Rule 8(a)(2) as written does not ask for much. It requires merely "fair notice of what the . . . claim is and the grounds upon which it rests." *Twombly*, 127 S. Ct. at 1964 (citing *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). *Twombly* teaches that there is a critical difference between lack of notice of what the claim is—a claim that "defendant negligently harmed plaintiff," for instance, with not a single further factual allegation to support it, would be fundamentally lacking in that respect—and lack of persuasiveness, evidentiary support, or likelihood of success of clear and well-noticed allegations. The courts will police the former under Rule 8(a)(2), *see, e.g., Briscoe v LaHue*,663 F.2d 713 (7th Cir. 1981) (allegation that defendants conspired to violate constitutional rights with no facts whatever) but not the latter. *Scheuer v. Rhodes*, 416 U.S. 232, 236

(1974) (a well-pleaded complaint may proceed even if it appears "that a recovery is very remote and unlikely") (cited in *Twombly*, 127 S. Ct. at 1965). Yet the latter—the evidentiary weight of Iqbal's allegations against these petitioners, rather than the clarity of notice that these are his allegations—is the ground of General Ashcroft's and Director Mueller's attempt to have the complaint found wanting. Far from supporting the petitioners' farfetched theory of federal pleading, *Twombly* definitively refutes it.

B. *Twombly* Respects the Principles of Notice Pleading and the Bar to Judicial Amendment of the Rules

The majority opinion in *Twombly* took repeated pains to acknowledge that it was not changing the liberal, permissive Rule 8(a)(2) pleading standard. *Twombly,* 127 S. Ct. at 1973 n.14, 1974 ("we do not apply any 'heightened' pleading standard" and "we do not require heightened fact pleading of specifics").

However, the Court in *Twombly* faced a very real problem: a complaint whose factual allegations of a conspiracy to violate § 1 of the Sherman Act were consistent with both lawful and unlawful conduct. The Court read the complaint to allege such a conspiracy based on equivocal facts alone, which was an insufficient "showing that the pleader is entitled to relief" under Rule 8(a)(2). The Court's response was to draw two lines, and remind plaintiffs that Rule 8(a)(2) required them to cross them both: one between "conceivability" and "plausibility," and the other between "factual neutrality" and "factual suggestiveness." *Twombly,* 127 S. Ct. at 1966 n.5. Pleading defects along those two axes could equally

well be called equivocal allegations and conclusory ones.

1. Equivocal allegations in unique fact situations may call for further pleading.

Twombly presented a unique phenomenon in antitrust law and economics: consciously parallel conduct may indicate independent action, indeed action betokening intense and honest competition, just as readily as it may indicate unlawful collusion among ostensible competitors. *See* Phillip E. Areeda, ANTITRUST LAW ¶ 1402a at 9 (1986) ("setting one's own profit-maximizing price [is] entirely lawful under the antitrust laws," which are "concerned with such price fixing only when it is the subject or result of a conspiracy"). This understanding is the basis for a long-established rule of Sherman Act application that *Twombly* merely reaffirms. *See Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (summary judgment) ("conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy"); *Golden Bridge Tech., Inc. v. Motorola Inc.*, No. 07-40954, 2008 WL 4661807 (5th Cir. Oct. 23, 2008) ("Independent parallel conduct, or even conduct among competitors that is consciously parallel, does not alone establish the contract, combination, or conspiracy required by § 1.") (citing *Twombly*, 127 S. Ct. at 1964). The complaint in *Twombly* based its inference of an unlawful antitrust conspiracy entirely on lawful parallel conduct. *See Twombly*, 127 S. Ct. at 1971

n.11 (allegations "proceed[ed] exclusively via allegations of parallel conduct") (citation omitted).[2]

Even if *Twombly*'s instruction on equivocal allegations applies beyond the antitrust conspiracy context, the decision should be understood to require further allegations beyond the complaint only where the complaint either does not allege actionable conduct or makes allegations that are consistent with both actionable and non-actionable conduct. Those further allegations may be obtained either via a reply to an answer ordered under Fed. R. Civ. P. 7(a)(7) or a motion for more definite statement entertained or invited under Rule 12(e). To give effect to the Rules' design to make those devices available as part of liberal notice pleading, as the Second Circuit suggested, further allegations should be obtained before dismissing a complaint for Rule 8(a)(2) insufficiency. *Iqbal v. Hasty*, 490 F.3d 143, 158 (2d Cir. 2007) ("in order to survive a motion to dismiss under the plausibility standard of *Bell Atlantic*, a conclusory allegation concerning some

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[2] Factual phenomena of this type may be relatively rare: circumstantial evidence of unlawful conduct does not typically bolster with equal force the inference that the conduct is emphatically lawful. Thus the sentinel function of *Twombly* may serve only a small class of cases, perhaps limited to antitrust conspiracies and their close relatives. However, regardless of the foregoing, if *Twombly* were read to reach into a broader variety of fact patterns involving states of mind, the decision would collide with Fed. R. Civ. P. 9(b), which provides that "malice, intent, knowledge, or other condition of mind of a person may be averred generally" in federal notice pleading absent a specific, statutorily imposed heightened pleading requirement.

elements of a plaintiff's claims might need to be fleshed out by a plaintiff's response to a defendant's motion for a more definite statement").

2. Conclusory claim "labels" completely devoid of factual content may add so little to equivocal allegations that they fail to give an adversary fair notice.

Twombly also stands for a rule against empty, conclusory "label" allegations without a shred of factual content. *Twombly*, 127 S. Ct. at 1964-65 (notice of "grounds" under Rule 8(a)(2) may require "more than labels and conclusions" or "formulaic recitations of . . . a cause of action" even though it does not require "detailed factual allegations"). After *Twombly* as before, a complaint's allegations satisfy Rule 8(a)(2) when they give fair notice of the claim even without pleading specific facts.

These concepts are fully reconciled in *Erickson v. Pardus*, 127 S. Ct. 2197 (2007), in which a prisoner plaintiff alleged that prison officials' cessation of his hepatitis C treatment caused "irreversible damage" to his liver and endangered his life. *Id.* at 2199. The court of appeals held those allegations too "conclusory" to set forth "substantial harm" from the cessation of treatment as opposed to the disease itself, an element it held necessary to the plaintiff's Eighth Amendment claim; the court apparently would have required specific medical allegations about the worsening of the plaintiff's liver disease or enumeration of symptoms that cessation of treatment, rather than the disease itself, had caused. *Id.* at 2199-2200. This Court reversed, under *Twombly,* saying the wrongful cessation, irreversible

damage, and life endangerment allegations were sufficient to give "fair notice of the claim and the grounds upon which it rests" without further fact pleading. *Id.* at 2200.

Thus, under Rule 8(a)(2), an allegation that prison officials "harmed the plaintiff," for instance, or even "harmed the plaintiff's medical condition," without more, might not be enough to give fair notice; but an allegation that prison officials "endangered the prisoner's life" by causing "irreversible liver damage" after ceasing to treat him for his hepatitis C in prison is more than sufficient without pleading specific medical sequelae or alleging some particular degree of certainty that the cessation of treatment caused or exacerbated those consequences to a particular degree.

Above all, it continues to be clear that *Twombly* does not permit trial courts to require heightened pleading without express statutory authority. One month after the decision in *Twombly*, this Court held in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499 (2007), that even in a securities fraud complaint under Section 21D(b)(2) of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. § 78u-4(b)(2), the statutory heightened pleading requirement of a "'strong inference' of *scienter*" need only be strong enough that "a reasonable person would deem [it] cogent and at least as compelling as any opposing inference one could draw from the facts alleged." *Tellabs*, 127 S. Ct. at 2509-2510 (emphasis added). The majority opinion, *id.* at 2510, expressly rejected Justice Scalia's proposed alternative formulation, "whether the inference of scienter (if any) is *more plausible*

than the inference of innocence." *Id.* at 2513 (Scalia, J., concurring). It would reduce the heightened pleading concept to nonsense to equate its requirements with those that govern non-heightened pleading. If the Court is to honor its explicit pronouncement in *Twombly* concerning Rule 8(a)(2) for ordinary pleading, the two cannot be the same: non-heightened pleading requirements must be less severe.

If *Twombly* is to be read consistently with the anti-judicial rulemaking principle of the Rules Enabling Act, the decision cannot have changed Rule 8(a)(2) in any respect—by making it the equivalent of Rule 9(b) on heightened pleading of fraud or mistake; by making it abrogate the provision of Rule 9(b) that "[m]alice, intent, knowledge and other condition of mind of a person may be averred generally"; or, least of all, by using it to invade the province of Rule 56(c), under which genuine disputes of material fact are for the factfinder to resolve at trial. *See Crawford-El v. Britton*, 523 U.S. 574, 598 (1998). Indeed,

> Rule 8(a)(2) does not contemplate a court's passing on the merits of a litigant's claim at the pleading stage. Rather, the "simplified notice pleading standard" of the Federal Rules "relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims."

Twombly, 127 S. Ct. at 1982 (quoting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002)).

The lower courts are converging on a reading of *Twombly* that retires the literal "no set of facts" language of *Conley*, as this Court held should occur, and retains the heart and soul of liberal notice pleading under Rule 8(a)(2).

The Second Circuit opinion that *amicus* urges this Court to affirm is not alone. *See, e.g., Mauras v. United States*, 82 Fed. Cl. 295, 299 (Ct. Fed. Cl. 2008) (citing *Twombly*) (issue under claims court's counterpart to Rule 8(a)(2) is "[w]hether [the breach of contract complaint] alleges facts consistent with a claim for breach of contract"); *Phillips v. County of Allegheny*, 515 F.3d 224, 234-35 (3d Cir. 2008), citing Edward H. Cooper, *NOTICE PLEADING: THE AGENDA AFTER TWOMBLY* 5 (Jan. 2008) (unpublished manuscript on file with the Administrative Office of the United States Courts, Rules Committee Support Office), *available at* www.uscourts.Gov/rules/Agendabooks/st2008-01.pdf ("Rule 8(a)(2) has it right").

Twombly did not abandon notice pleading; on the contrary, it affirmed it. *Twombly*, 127 S. Ct. at 1976, 1982, 1984 n.8. The decision merely emphasized that Rule 8(a)(2) requires some sort of showing, dependent on the nature of each claim, that the pleader is entitled to relief on the claim asserted. For conspiracy in antitrust, that showing is some allegation consistent with agreement, which is unlawful, and not just parallel conduct, which is lawful. For *Bivens* actions it is some allegation that the defendant violated a constitutional right. But in neither of these, nor in any other type of civil action, after *Twombly* any more than before, must the required "showing that the pleader is entitled to

relief" include factual allegations beyond the kind described above.

C. Iqbal's Allegations Meet the *Twombly* Test.

In the instant case, Iqbal's allegations against these petitioners are far beyond the narrow category that courts may find wanting under Rule 8(a)(2) after *Twombly*. The highly detailed, 207-paragraph complaint, prepared by competent and sophisticated counsel, contains numerous specific factual allegations about petitioners Ashcroft and Mueller. Compl. ¶¶ 10, 11, 47, 69, 74, 96-97, 195, 205, 232, 235, 250 (Pet. App. 1a-215a); *see also* Iqbal Br. at 47-48. These allegations are anything but equivocal, setting forth the plaintiff's claim that Ashcroft and Mueller "promulgat[ed] the policy" under which he was subjected to the brutally harsh treatment he complained of; that one petitioner "designed" the policy and the other was "instrumental in" its "adoption, promulgation and implementation"; and that both men "were aware of" and "condoned" the selective ADMAX SHU placement of the plaintiff and persons similarly situated based "solely" on the detainees' race, national origin, and religion. Those allegations assert direct personal involvement by both officials and are patently inconsistent with lawful conduct or allegations of mere *respondeat superior* liability. And they are more than conclusory: they specifically set forth the constitutional wrongs committed by these petitioners. It is hard to see, and petitioners avoid suggesting, just what further allegations could be required to assure that Iqbal's complaint was neither equivocal nor conclusory under *Twombly*.

II. A PLEADER CANNOT BE REQUIRED TO ANTICIPATE OR NEGATE A DEFENDANT'S QUALIFIED IMMUNITY OR ANY OTHER AFFIRMATIVE DEFENSE.

For federal civil pleading purposes under Rule 8(a)(2), qualified immunity under Section 1983 or *Bivens* is no different from any other affirmative defense: a pleader cannot be required to anticipate or negate it in order to produce a "short and plain statement of the claim" that satisfies the Rule. *Jones v. Bock*, 127 S. Ct. 910, 919 (2007). This allocation of pleading burdens for affirmative defenses is as old as Rule 8(c), originally enacted with the first federal civil Rules in 1938, which provides that "in pleading to a preceding pleading, a party shall set forth affirmatively . . . any . . . matter constituting an avoidance or affirmative defense." *Jones*, the modern Court's up-to-date pronouncement, held that under the Prison Litigation Reform Act of 1995 ("PLRA"), 42 U.S.C. §§ 1997e *et seq.*, prisoner plaintiffs did not have the burden of pleading the affirmative defense of administrative exhaustion set forth in the statute, even though the defense—where meritoriously raised by defendants—would compel dismissal of the suit under Rule 12(b)(6). *Id.* at 919-21.

Similarly, the allocation to defendants of the responsibility to plead qualified immunity is as old as the defense itself. *Gomez v. Toledo,* 446 U.S. 635, 640 (1980); *Butz v. Economou,* 438 U.S. 478, 485 (1978). *Gomez*, one of the early qualified immunity cases, held simply that "[s]ince qualified immunity is a defense, the burden of pleading it rests with the defendant." *Id.* at 640 (citing 5 Charles Alan Wright & Arthur R. Miller FEDERAL PRACTICE AND

PROCEDURE § 1271 (1969)). "It is for the official to claim that his conduct was justified by an objectively reasonable belief that it was lawful. We see no basis for imposing on the plaintiff an obligation to anticipate such a defense by stating in his complaint that the defendant acted in bad faith." *Gomez*, 446 U.S. at 640.

Petitioners here contend for a policy-based pleading exception tailored to them, *i.e.*, a shift of the pleading burden to plaintiffs for situations where high government officials assert qualified immunity. However, as *Jones v. Bock* reaffirmed, this Court's settled understanding is that "courts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns." *Id.*; *Twombly*, 127 S. Ct. at 919 (citing *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993)) (rejecting argument that municipal liability plaintiffs should be required to overcome qualified immunity defense in their pleading) ("that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation").[3]

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[3] The exception sought is arguably tailored so narrowly to the post-September 11 actions of these petitioners as to suggest a claim that they or their actions are above the law. *See* Iqbal Br. at 22, 25-27 (pointing to incoherence of petitioners' proposed special exception to normal pleading requirements based on their status and the security considerations surrounding their post-September 11 decisions). This Court has properly rejected that position in case after landmark case, particularly but not only concerning government actions after the September 11 attacks or the assertions of high officials that they or their important functions should receive special

The long list of affirmative defenses that "shall [be] set forth affirmatively" under Fed. R. Civ. P. 8(c) was "not intended to be exhaustive." 5 Wright & Miller, § 1271 (Supp. 2008) (listing defenses not enumerated). However, no affirmative defense prevails for mere failure of the pleader to plead around it under Rule 8(a)(2). The rule is thoroughly established that whether a complaint states a claim as a matter of pleading is a separate question from whether an affirmative defense against that claim should prevail. *See, e.g., Swierkiewicz*, 534 U.S. at 515, cited in *Twombly*, 127 S. Ct. at 1973-74.

It may seem counterintuitive that an immediate, even absolute defense to a pleader's claim need not be rebutted in the complaint in order to "show" an

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treatment. *See, e.g., Boumediene v. Bush*, 128 S. Ct. 2229, 2245 (2008) (rejecting Government's contention that habeas corpus was suspended for U.S. detainees at Guantanamo) (citing 1 Frederick Pollock & Frederic W. Maitland, HISTORY OF ENGLISH LAW 173 (2d ed. 1909) (Magna Carta "means this, that the king is and shall be below the law"); *Clinton v. Jones*, 520 U.S. 681, 692 (1997) (holding that president was not entitled to temporary immunity from private legal proceedings while in office); *Nixon v. Fitzgerald*, 457 U.S. 731, 758 (1982) (holding that presidential immunity from certain damage claims did not "place the president above the law"); *Mitchell v. Forsyth*, 472 U.S. 511, 520-24 (1985) (rejecting view that Attorney General should receive absolute immunity when he claims his actions were motivated by national security concerns) ("the security of the Republic" will not be threatened if high government officials "on occasion have to pause to consider whether a proposed course of action can be squared with the Constitution and laws of the United States").

"entitle[ment] to relief" under Rule 8(a)(2). However, if the pleading allocation rule were otherwise, and a plaintiff were required to plead around all possible affirmative defenses or suffer dismissal before the defendant ever had to litigate any such defenses, federal notice pleading as we know it would cease to exist. Instead complaints could be dismissed for a plaintiff's failure to account at the threshold for every defense, in law or fact, that an adversary might be able to erect. Defenses would no longer be adjudicated on their merits, but complaints would be subject to dismissal or procedural default for failure to plead around them. The result would be exhumation of all the hobgoblins of pleading formalism that the Federal Rules were promulgated to inter. *See* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective,* 135 U. PA. L. REV. 909 (1987) (discussing Rules framers' desire to replace pre-1938 pleading formalism with more permissive system designed to reach merits of disputes more easily).

This Court has "refused to change the Federal Rules governing pleading by requiring the plaintiff to anticipate the immunity defense." *Crawford-El*, 523 U.S. at 595. This and all other affirmative defenses must be pleaded by the party asserting them, as has been true since the advent of the Rules. *Blonder-Tongue Labs., Inc. v. Univ. of Illinois Found.*, 402 U.S. 313, 350 (1971) (claim and issue preclusion); *Sherman v. Winco Fireworks, Inc.*, 532 F.3d 709, 714-15 (8th Cir. 2008) (preemption); *Xechem, Inc. v. Bristol-Myers Squibb Co.*, 372 F.3d 899 (7th Cir. 2004) (statute of limitations); *Bentley v. Cleveland County Bd. of County Comm'rs*, 41 F.3d 600, 604

(10th Cir. 1994) (qualified and absolute immunity); *Travellers Int'l, A.G. v. Trans World Airlines, Inc.*, 41 F.3d 1570, 1580 (2d Cir. 1994) (failure to mitigate damages); *Starcraft Co. v. C.J. Heck Co. of Texas, Inc.*, 748 F.2d 982, 990-992 (5th Cir. 1984) (circuitous action); *Green v. James*, 473 F.2d 660, 661 (9th Cir. 1973) (absolute immunity); *Railway Exp. Agency v. Mallory*, 168 F.2d 426, 427-28 (5th Cir. 1948) (contributory negligence); *Continental Collieries v. Shober*, 130 F.2d 631, 635-36 (3d Cir. 1942) (statute of frauds).

As the lower courts understand from *Twombly* and *Crawford-El*, "[t]he pleading standard is no different simply because qualified immunity may be raised as an affirmative defense." *Tamayo v. Blagojevich*, 526 F.3d 1074, 1090 (7th Cir. 2008) (citing *Twombly* and *Crawford-El*, 523 U.S. at 595).

Even if the qualified immunity of high officials alleged to have committed grave violations of the Constitution is imagined in theory to be worthy of a dangerous judicial exception to the rules of pleading, any such exercise is a classic slippery slope best avoided by not beginning the descent. The federal courts' approach, specifically sanctioned in *Leatherman*, 507 U.S. at 168-69, and carefully managed by the lower courts in the present case, has been to subject claims against high government officials to strict discovery controls but not to extinguish them altogether. *See, e.g., In re Papandreou*, 139 F.3d 247, 254-55 (D.C. Cir. 1998) (order of District Court ordering deposition of Greek ministers reversed); *Ahearn v. Rescare West Virginia*, 208 F.R.D. 565 (S.D. W. Va. 2002) (deposition of regional director of NLRB not allowed); *Murray v.*

County of Suffolk, 212 F.R.D. 108 (E.D.N.Y. 2002) (deposition of county police commissioner not allowed); *Shirley v. Chestnut*, 603 F.2d 805, 807 (10th Cir. 1979) (protective order issued in favor of governor); *Peoples v. U.S. Dep't of Agriculture*, 427 F.2d 561, 566 (D.C. Cir. 1970) (deposition of cabinet officer generally not allowed); *Wirtz v. Local 30, Intern'l Union of Operating Engineers*, 34 F.R.D. 13 (S.D.N.Y. 1963) (deposition of cabinet official precluded). The same approach is effective with regard to private persons in high positions. *See, e.g., Stelor Productions, Inc. v. Google, Inc.*, No. 05-80387-CIV, 2008 WL 4218107 (S.D. Fla. Sept. 15, 2008) (Rule 30(b)(6) deposition of Google official would be ordered before depositions of Google's founders sought by plaintiff even as to matters uniquely within their personal knowledge).

III. TO REQUIRE PLEADING OF FACTS THAT ARE INACCESSIBLE TO PLAINTIFFS WITHOUT DISCOVERY IS INCONSISTENT WITH FUNDAMENTAL FAIRNESS.

Chief Justice Marshall recognized the centrality of access to justice in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.").

The requirements of pleading do not in and of themselves deny access to the courts in a constitutional sense. *Christopher v. Harbury*, 536 U.S. 403, 417-18 (2002) (access to courts claim must

itself be pleaded in a manner that satisfies Rule 8(a)(2)). Even heightened pleading requirements imposed by statute or rule to give a defendant fair notice are not unconstitutional *per se*, although the gravamen of *Swierkiewicz* was that under principles of federal notice pleading, access to one's day in court should not be defeated by such requirements. *Swierkiewicz*, 534 U.S. at 513-15, *cited in* Christopher Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 590-91 & n.295 (2002); *see also Crawford-El*, 523 U.S. at 585 (rejecting heightened pleading requirement beyond Rule 9(b) for state of mind allegations that lower court had adopted to give notice of matters "easy to allege and hard to disprove").

The access to justice problem that should concern the Court here is that the *de facto* heightened pleading requirement proposed by petitioners would penalize respondent Iqbal for his inability to allege "hidden facts," *i.e.*, facts within the petitioners' sole knowledge that are inaccessible to a plaintiff without discovery. In the run of cases it will be difficult or impossible for an ordinary plaintiff to plead, for instance, the content of a high official's specific thoughts at a given time or place, or the specific times, places, or contents of high-level meetings or conversations that by nature are extremely sensitive, confidential, and known only to a few inside the government. To force a pleader to allege the content of those secrets in order to avoid dismissal of a complaint that otherwise satisfies Rule 8(a)(2) is an intolerable Catch-22 restriction on access to justice.[4]

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[4] *See* Joseph Heller, *CATCH-22* 46 (Simon & Schuster 1961) (describing self-contradicting circularity of fictional

On petitioners' theory of pleading advanced herein, the higher the office, public or private, that the defendant occupies, and the more secret and less accessible to the plaintiff is direct evidence of the wrongdoing he or she is able to allege indirectly or circumstantially, the more perfectly insulated is the alleged wrongdoer—potentially hiding serious constitutional harms.

Such a rule effectively would accord such officials absolute immunity from suit, a protection greater than the qualified immunity that *Harlow* held was sufficient to protect them and their functions from unwarranted assault. *Harlow v. Fitzgerald*, 457 U.S. 800, 807-08 (1982) (no absolute immunity for high executive branch officials). It is precisely the principle of access to courts for redress that kept the Court in *Harlow* from raising qualified immunity to absolute. *Id.* at 807 (stressing "the importance of a damages remedy to protect the rights of citizens"), *citing Economou*, 438 U.S. at 504-505.

Even in cases with heightened pleading requirements, courts have taken care not to place litigants in paralyzing double binds of pleading. An excellent example is *Emery v. American General*

World War II military rule that although insanity was a ground for release from combat missions, and an aviator "had to be crazy" to fly such missions in view of their extreme risk, he could never be spared them because to ask for the dispensation was proof of his sanity, and sanity precluded relief). *Cf. Giles v. Harris*, 189 U.S. 475 (1903) (holding, in a decision since discredited, that black citizen had no valid claim to be added to a voter roll he alleged was void because it excluded blacks).

Fin., Inc., 134 F.3d 1321, 1323 (7th Cir. 1998) (civil RICO) (Posner, J.), where the court held:

> We don't want to create a Catch-22 situation in which a complaint is dismissed because of the plaintiff's inability to obtain essential information without pretrial discovery (normally of the defendant, because the essential information is in his possession and he will not reveal it voluntarily) that she could not conduct before filing the complaint. But Rule 9(b) is relaxed upon a showing of such inability. . . . Rule 9(b) is satisfied by a showing that further particulars of the alleged fraud could not have been obtained without discovery.[5]

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[5] Judge Posner showed sensitivity to the catch-22 problem in a related heightened pleading context in *Tregenza v. Great American Commc'ns Co.*, 12 F.3d 717, 721 (7th Cir. 1993), in which the plaintiff was caught between Rule 9(a) pleading-with-particularity requirements and the statute of limitations under Section 9(e) of the 1934 Securities Act which required that suit be filed within a year of discovery of "the facts constituting the violation." To wait long enough to acquire "actual knowledge" that fraud was occurring might exceed the limitations period; to file suit earlier on lesser suspicions (known as "inquiry notice") might make the pleading requirements impossible to meet. Judge Posner's solution in *Tregenza* was to affirm the inquiry notice measure of accrual for limitations purposes, but implicitly to accept that pleading such notice would have been sufficient even for the heightened pleading required by Rule 9(b), *id.* at 722—and either way that a complaint could not be required to negate affirmative defenses to satisfy pleading rules. *Id.* at 718.

Similar decisions from other courts include *Ouaknine v. MacFarlane*, 897 F.2d 75 (2d Cir. 1990) (plaintiff satisfies Rule 9(b) if she makes "allegations [concerning facts that] lie peculiarly within the opposing parties' knowledge and [those allegations] are accompanied by information that raises a strong inference of fraud."); *Craftmatic Securities Litigation v. Kraftsow*, 890 F.2d 628, 645 (3d Cir. 1990) (allowing plaintiffs to proceed on the basis of unsubstantiated allegations made on information and belief when "the necessary information lies within defendants' control"); *In re Ashanti Goldfields Securities Litig.*, 184 F. Supp. 2d 247, 258 (E.D.N.Y. 2002) (finding defendant's internal documents unnecessary to make securities fraud pleadings sufficient under Rule 9(b)). In *Ashanti*, the court held:

> [H]eightened pleading requirements often put plaintiffs in a Catch-22 in securities fraud cases. Many plaintiffs do not have access to internal documents of the entities against which they wish to file claims, but those documents are the best way to demonstrate the alleged fraud. In effect, the heightened pleading requirement in many cases prevents plaintiffs from conducting the discovery they need to meet the requirement.

Id. at 258 *(*citing Elliott J. Weiss & Janet E. Moser, *Enter Yossarian: How To Resolve The Procedural Catch-22 That The Private Securities Litigation Reform Act Creates*, 76 WASH. L.Q. 457, 500-01 (1998)) (noting that even under the defendant-

protective Private Securities Litigation Reform Act, courts must still allow limited, particularized discovery on a showing that the information needed to substantiate the fraud claim is within the defendant's sole possession). *See also* Note, *Pleading Securities Fraud Claims with Particularity under Rule 9(b)*, 97 HARV. L. REV. 1432, 1436-38 (1984). If courts can apply even heightened pleading requirements with care to avoid the Catch-22 described here, surely they should do so where Rule 9(b) does not require heightened pleading.

Finally, it may be possible to infer "hidden facts" and allege them in good faith in a manner that satisfies Fed. R. Civ. P. 11 without satisfying the pleading standard that petitioners would have the Court require. That Rule provides that a party's or attorney's signature on a pleading or other paper attests that its factual allegations "have evidentiary support or, if specifically so identified, are likely to have evidentiary support after an opportunity for further investigation or discovery." Fed. R. Civ. P. 11(b)(3). The "opportunity" language just quoted would not make much sense, nor would its inclusion in the Rules as applicable to all cases, if the real floor of Rule 8(a)(2) for any category of case were higher, *i.e.*, if pleadings were always to be stricken for want of more than the minimum Rule 11 contemplates litigants will be able to submit in good faith. Under Rule 8(a)(2), as it should be understood for all allegations not subject to heightened pleading by statute or rule, the real floor is where Rule 11(b)(3) puts it, but only for the allegations that Rule 8(a)(2) requires a pleader to make. The Rules do not create a double standard, nor should this Court permit government defendants, no matter how highly

placed, to interpolate one as it suits them. Consistency with the Rules, with notice pleading principles, and with the values of access to the courts described herein require allegations to be deemed sufficient on the time-honored Rule 8(a)(2) "short and plain statement" standard that this Court has repeatedly affirmed does not require heightened pleading.

CONCLUSION

For the foregoing reasons, *amicus* American Association for Justice urges that the decision of the Second Circuit be affirmed.

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